IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 74 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE D.H.WAGHELA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
KIRAN CORP. - Respondent(s)

==========

Appearance :
Mrs. Mona Bhatt for MR MANISH R BHATT for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR JUSTICE R. S. GARG
and
HONOURABLE MR JUSTICE D.H. WAGHELA

Date : 11/10/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'B', under section 256 (1) of the Income Tax

Act, 1961, at the instance of the Revenue, has made this Reference on the following questions for our opinion which arises out of Income Tax Appeals No.169/Ahd/1992 relating to Assessment Year 1989-90:

> *"Whether on the facts and in the circumstances of the case, the Hon'ble I.T.A.T. Was justified in law in allowing 50% of the secret commission as admissible deduction under section 37 of the I.T. Act in absence of any corroborative evidence to support it ?"*

2. The facts in nutshell are that the assessee, a partnership firm which deals in dyes and chemicals, for the assessment year 1989-90, filed return of income on 31.10.1989 declaring total income of Rs. 2,92,790/- which was revised on 6.12.1991 to declare the income of Rs. 4,20,283/-. The assessment was made on 23.12.1991 under section 143 (3) determining the total income of Rs. 9,13,187/-. The A.O. while determining the income, disallowed the secret commission of Rs. 4,73,714/- on the ground that the assessee was neither able to co-relate the

transaction of sale with the alleged payment of secret commission nor could he substantiate genuineness of the payment. The CIT (Appeals), wide his letter No. CAS/1114/91-92 dated 27.3.1992, dismissed the appeal of the assessee. Therefore, he filed further appeal to the Tribunal. The Tribunal, after hearing the parties ultimately held that in almost identical situation in the matter of M/s. Vyas & Co. which also had paid secret commission, 50% deduction was given to M/s.Vyas & Co. and, therefore, the appellant before it i.e. the assessee which happens to be a sister concern, would also be entitled to the relief to the extent of 50%. The order passed by the Tribunal not being palatable to the department, they made application and the Tribunal had accordingly made the Reference.

3. Mrs. Bhatt, learned counsel for the applicant, submits that in the matter of Vyas & Co., in ITR No.55 of 1994 decided on 1.9.2006, the Tribunal so also the High Court held that as one of the partners, who paid secret commission, had submitted the vouchers relating to payment, it was accepted to be

a true fact. The Tribunal was held justified in conceding to the secret commission, but, in the present case, in absence of any supporting material or valid vouchers, the Tribunal could not rely upon the judgment in the matter of M/s.Vyas & Co. and could not grant the concession.

4. The Tribunal, in its judgment has held that the assessee had submitted the details of the secret commission paid by it. The Tribunal, taking into consideration the totality of the circumstances, came to the conclusion that it would be justifiable in the facts of the case to hold that the present assessee would also be entitled to claim deduction relating to 50% of the secret commission. In our opinion, the Tribunal was not unjustified in relying upon its own judgment in the matter of M/s.Vyas & Co. which was later on confirmed by this Court.

5. As the Tribunal has recorded finding of fact relating to payment of commission/secret commission, we do not find that it would be prudent on our part

to interfere in the matter and hold that the Tribunal was not justified in relying upon its earlier judgment. The question is answered in affirmative, against the interest of the Revenue. The Reference stands disposed of. No costs.

[R. S. Garg, J.]

[D. H. Waghela, J.]

msp